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No. 01-384

In The

Supreme Court of the United States

ED BROWN, *et al.*,

Petitioners,

v.

JAMES S. GILMORE, III, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), the Court held that an Alabama minute of silence law was invalid because it "was not motivated by any clearly secular purpose – indeed, the statute had no secular purpose." Does the holding in *Wallace* require invalidation of Virginia's minute of silence law, which has a different text, different legislative history and different record of implementation?

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is filed by the Attorney General of Virginia on behalf of all respondents (collectively, "the Commonwealth") in defense of the Virginia minute of silence statute, Va. Code § 22.1-203 ("the Act").

INTRODUCTION

For a quarter century, Virginia law has authorized local school divisions to establish a daily minute of silence in their classrooms. In 2000, the law was amended in two ways. First, instead of *authorizing* school divisions to have a minute of silence, the law now *requires* them to do so. Second, Virginia's Attorney General now has responsibility for defending the law. No other changes were made.

The Act does not require students to do anything or say anything or hear anything. It does not require them to make any gesture or acknowledgment. It only requires them to stay in their seats, to remain silent and not to distract their classmates. This is the same rule that governs students everywhere for most of the school day. The one difference is this: just as the students must remain silent, so must the teacher. For one minute – 60 seconds – nobody will say anything. The students will be left to themselves. If they wish, they may meditate, reflect or pray silently. Or, they may read or look out the window. They may do anything they want, or nothing at all. The only requirement is that they must stay seated and silent and not distract anyone else. This is not a lot to ask, and it is not unconstitutional. There is nothing to fear from a classroom of silent, thoughtful children.

STATEMENT OF THE CASE

There is nothing unusual about the Act. The Virginia law is one of *twenty-five* minute of silence statutes identified by Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. 38,

70, 71, n.1 (1985) (O'Connor, J., concurring in judgment) (citing Va. Code § 22.1-203). As she noted, the "typical" statute allows students to "meditate, pray or reflect on the activities of the day." *Id.* at 70-71. All nine Justices in *Wallace* strongly indicated that such statutes are constitutional so long as they have a secular legislative purpose.[1]

As amended in 2000, the Act has *three* secular legislative purposes: (1) implementing constitutional guarantees of religious liberty in public schools; (2) advancing pedagogical goals, *e.g.*, good order and discipline, an opportunity for introspection, and improved student focus on the day's educational activities; and (3) extending benefits of a minute of silence statewide while providing a defense to any lawsuit against it. In the context of an Establishment Clause challenge, this Court has approved a three-part inquiry for determining the purposes that motivated legislation. A secular purpose may be shown by "[1] the statute on its face, [2] its legislative history, or [3] its interpretation by a responsible administrative agency." *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987). As shown by the following review of the evidence, each of these areas of inquiry confirms the secular purposes of the Act.[2]

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[1] *See Wallace*, 472 U.S. at 56, 59 (Stevens, J., majority opinion); *Id.* at 66 (Powell, J., concurring); *Id.* at 76, 84 (O'Connor, J., concurring in judgment); and *Id.* at 84 (Burger, Ch. J., dissenting); *Id.* at 90 (White, J., dissenting); *Id.* at 91 (Rehnquist, J., dissenting).

[2] While the factual review is set forth largely in chronological order, many paragraphs relate directly to the three areas of inquiry prescribed by *Edwards*. For the face of the statute, see ¶¶ 1 and 2; for legislative history, see ¶¶ 1, 2, 10, 11, 12, 13, 14; and for agency interpretation, see ¶¶ 6, 15 and 16. For evidence of real world conditions corroborating the genuineness of the asserted secular purposes, see ¶¶ 3, 4, 5, 7, 8 and 9.

The Act Has a Successful Record.

1. Origin and Text: Virginia enacted its minute of silence law in 1976. *See* 1976 Va. Acts, ch. 103. Until 2000, the Act authorized – but did not require – local school divisions to establish a minute of silence. Here is the text, showing changes made by the 2000 amendment:

> **§ 22.1-203. Daily observance of one minute of silence.**
>
> In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division ~~is authorized to~~ *shall* establish the daily observance of one minute of silence in each classroom of the division.
>
> ~~Where~~ *During* such one-minute period of silence ~~is instituted~~, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.
>
> *The Office of the Attorney General shall intervene and shall provide legal defense of this law.*

2000 Va. Acts, ch. 1022. (Italics show additions; strikethroughs show deletions.)

2. Petitioners' Faulty Discussion: Petitioners repeatedly delete the term "any" from the statutory phrase "any other silent activity," replacing it with ellipsis and thus minimizing the scope of permitted activities. Pet. at (i) and 3. Petitioners also suggest the legislature showed doubts about the law's constitutionality

because it provided for a legal defense through the Attorney General. Pet. 4. This is a *non sequitur.* The legislature simply recognized that some announced opponent of the Act – such as the ACLU – would likely bring a costly but misguided lawsuit. *See* letter of M. Earley to R. McDonnell, Mar. 6, 2000, J.A. 345;[3] Senate Transcript, Feb. 1, 2000, J.A. 338-39. This petition bears out that prediction.

3. The Act Has Worked Well: Evidence about how the Act has worked was provided by the State Superintendent of Public Instruction, Dr. JoLynne DeMary. She testified that, between 1976 and 2000, at least 20 local school divisions chose to establish a minute of silence. J.A. 400.[4] There is no evidence anyone used it as a government prayer exercise. The State Superintendent's survey of school principals did not reveal any peer-on-peer harassment or other problems. Fourth Cir. Op., Pet. 5a. Students confirmed that the minute of silence "worked well and has not caused anyone a problem." J.A. 438, 440.

4. Acknowledgement by Petitioners: Petitioners agreed the Act has pedagogical benefits, telling the district court: "[I]t's a good thing for children to start the day with some reflection. It is probably a very good thing. . . . [I]t would help . . . every . . . child to do that." Fourth Cir. Op., Pet. 17a, n.5.

5. Discipline and Focus Improved: As the State Superintendent noted, students often arrive at school in an emotional state not conducive to discipline or a focus on learning. She said "[a] minute of silence works as a good transition, enabling students to pause, settle down, and focus on the day ahead." It is "a good classroom management tool and makes for a better school day." J.A.

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[3] Where possible this brief will cite the opinion of the court of appeals (Pet. 1a-25a), or opinion of the district court (Pet. 53a-68a). Where necessary, the brief will cite the joint appendix used in the court of appeals.

[4] Petitioners incorrectly report "fewer than 20." Pet. 3.

401.[5] A minute of silence was helpful even before the events of September 11, and is likely to be even more so in light of the present national crisis.

6. Official Guidelines on the Act: In 1994, the General Assembly required the State Board of Education to develop "guidelines on constitutional rights and restrictions relating to prayer and other religious expression in the public schools . . . " Va. Code § 22.1-280.3. The Board included guidelines about the Act in terms that further document its secular purpose:

> Public schools may provide students . . . with a minute of silence to collect themselves and put their upcoming tasks in meaningful perspective for the individual student. A brief minute of silence may also fulfill other secular objectives, including maintenance of discipline.
>
> * * *
>
> The teacher may not indicate his or her views on whether students should use the time to pray or not to pray. The teacher should also not use the time to pray aloud in front of other students, nor permit any other student, or group of students, to pray aloud.

Fourth Cir. Op., Pet. 5a.

Discrimination against Religious Expression.

7. Misunderstanding the Constitution: Public school administrators and teachers often have the misperception that student religious expression is unconstitutional or may be prohibited at their discretion.

a. The State Superintendent testified that:

> [T]eachers, principals and other school administrators often believe (i) that the separation of

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[5] On this point and many others, the testimony of Dr. DeMary was corroborated by the testimony of Dr. William C. Bosher, Jr., a former State Superintendent. J.A. 411-413.

> church and state prevents them from allowing students to engage in various forms of religious expression in the public schools or (ii) that they must restrict such expression in order to avoid the risk of time-consuming and expensive lawsuits.

J.A. 402.

b. Jay Alan Sekulow, Esq., a nationally-known expert on religious discrimination, gave this opinion:

> [T]here is a widespread perception among public school administrators and teachers – including those in Virginia – that religious expression and the free exercise of religion by students in the public schools is constitutionally impermissible or is subject to prohibition at the discretion of school authorities.

J.A. 417.

c. When considering the Equal Access Act (20 U.S.C. §§ 4071-4074), Congress reported testimony about widespread religious discrimination in public schools. *See* Excerpts, "Equal Access: A First Amendment Question," Hearings Before Committee on Judiciary, U.S. Senate, 98th Congress, 1st Sess. S. 815 and S. 1059. J.A. 420-24.

d. President Bill Clinton also recognized the problem of religious discrimination:

> [S]ome students in America have been prohibited from reading the Bible silently in study hall. . . . Some students have been prevented even from saying grace before lunch.
>
> * * *
>
> Some school officials and teachers and parents believe that the Constitution forbids any religious expression at all in public schools. That is wrong.

"Remarks by the President on Religious Liberty in America," Vienna, Virginia, July 12, 1995, J.A. 393.

8. Incidents in Virginia: Virginia is not immune from this discrimination. "[C]onstitutional rights regarding religious liberty are often misunderstood. This misunderstanding has led to many instances in the Commonwealth where there has been discrimination against religious expression in the public schools." Dist. Ct. Op., Pet. 64a; *See* Sekulow, J.A. 417-18 (listing examples).

9. Avoiding Misinformation: The State Superintendent testified that "enactment of a minute of silence statute, without making specific reference to prayer as a permissible option, would likely lead to situations in which (i) some students would not be advised that prayer is a permissible option under the statute, and (ii) some students would actually be advised that prayer is not a permissible option." J.A. 403.

The 2000 Amendment Was Motivated by Secular Purposes.

10. Statement by Chief Sponsor: The Act was amended by SB 209, whose chief sponsor was Senator Warren E. Barry. His floor speech reminded his colleagues of the secular purposes of the bill:

> *[T]he purpose of the Bill [as] has been stated and restated is not a religious crusade. It's not to try and re-inject prayer into the public school system.* The primary thing was out of the frustrations that many of us have felt based on the violence in some of our schools, such as Columbine. . . .
>
> [W]e're not putting prayer on a higher pedestal or a lower pedestal than meditate and reflect. But if students would just spend one minute to reflect on who they are, what they're doing and where they're going. *The word prayer in there was put in there so prayer would not be discriminated against.*

Senate Transcript, Jan. 31, 2000, Fourth Cir. Op., Pet. 7a (emphasis added).[6]

> [I]ntrospection, by dictionary definition, means contemplation of one's own thoughts, feelings and purpose. *[I]f I were to accomplish anything with this Bill . . . I would hope that it would generate some introspection on the part of some students in our public schools.* Young people today are not afforded the opportunity for introspection because of today's technology . . . and other things that occupy their time from the time they get up in the morning to the time they go to bed at night. This would provide that opportunity.

Senate Transcript, Feb. 1, 2000, Dist. Ct. Op., Pet. 57a (emphasis added).

11. Petitioners Misstate Defeated Amendment: Petitioners say the General Assembly "rejected a proposed amendment to the bill that would have removed the specific reference to prayer as *one of two* stated silent activities in which students may engage." Pet. 4 (emphasis added). They misstate the facts. When Senator Edward Houck offered his floor amendment, the bill listed "meditation, prayer and reflection." J.A. 330. His amendment proposed striking *all three* activities. It was in opposing *this* amendment that one of the bill's many co-sponsors said students "simply will be quiet with no purpose." The co-sponsor also noted that, even without the proposed deletion, the minute of silence was non-sectarian. Fourth Cir. Op., Pet. 7a. Senator Houck agreed the legislation was "pure in terms of [its] intent." *Id.*[7]

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[6] Unlike the *Congressional Record*, which sometimes records speeches that no one gave – or that were given to nearly empty chambers – the speeches here were transcribed from video tapes of actual proceedings, and were delivered to chambers that were full or nearly so.

[7] In the proceedings below, petitioners relied on unsworn hearsay contained in newspaper clippings and alleged to reflect

12. Drafting by Attorney General: When SB 209 reached the House of Delegates, the bill took a more streamlined approach.[8] This approach, which became law, was drafted by the Virginia Attorney General, who wrote:

> [A]s the statute explains, the purpose is to guarantee "the free exercise of religion" and to guarantee "that the freedom of each individual pupil [is] subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds."
>
> * * *
>
> Using one minute of each school day for the purposes contemplated by this law would provide a moment for students to collect their thoughts, focus on the upcoming day, and exercise self-respect and discipline. In short, this legislation would contribute to quality by promoting a positive educational environment for our children.

Letter of M. Earley to R. McDonnell, Mar. 6, 2000, Dist. Ct. Op., Pet. 58a.[9]

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statements by individual legislators. Such materials are inadmissible and the Commonwealth duly noted its objection. While petitioners appear to have abandoned reliance on such materials, the Commonwealth preserves its objection if such improper materials resurface. *See* Fed. R. Civ. Pro. 56(e).

[8] Petitioners are again mistaken when they say the "General Assembly approved the minute of silence law in the form in which it was introduced." Pet. 3.

[9] This Court has said that "deference should be accorded to [federal] Attorney General's construction of [federal statute], especially in light of the extensive role played by the Attorney General in drafting the statute and explaining its operation to Congress." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 179 n.29 (1985). The same deference should be afforded to Virginia's Attorney General in his interpretation of the state statute he drafted and explained to the General Assembly.

13. Floor Statement by House Manager: Speaking before the vote, the House manager of SB 209, Delegate Robert F. McDonnell explained that the bill was based on "sound public policy" and the secular purposes of "maintaining good order and discipline, creating student focus on the activities at hand and assisting the teachers in beginning the day with a period of calm which would lead to better discipline in the classroom." House Transcript, Mar. 6, 2000, Fourth Cir. Op., Pet. 8a. Relying on both expertise and experience, he added "[m]any of the experts certainly would agree and . . . it has borne out in the localities that have implemented it, that this certainly also helps not only with the *focus* but also perhaps with *stress reduction* in having a period of concentrated silence as they begin the school day." *Id.* (emphasis added).

14. Statement by Governor: SB 209 was signed into law by Governor James S. Gilmore, III, who also recognized the bill's secular purposes, saying it would "restore a *sense of calm and civility* in public schools by offering students a peaceful minute each day to reflect upon their studies, to collect their thoughts, or, if they so choose, to bow their heads and pray." *Sine Die* Statement to General Assembly, Fourth Cir. Op., Pet. 8a (emphasis added). Petitioners misstate what the Governor said. They quote only his last five words. Pet. 4, 11-12.

The Amended Act Is Being Implemented Neutrally.

15. Statement by State Superintendent: In June 2000, the State Superintendent sent local school divisions a memorandum providing guidance on the amended Act. She said, "[This] legislation reflects the view that our young, and society as a whole, would be well served if students were afforded a moment of quiet reflection at the beginning of each day." Fourth Cir. Op., Pet. 9a. The memorandum also suggested that teachers introduce the minute by saying, "As we begin another day, let us pause for a minute of silence." *Id.* She also told local school

divisions that they should "caution teachers and administrators not to suggest or imply that students should or should not use that time for prayer. . . . *This time is not intended to be and shall not be conducted as a religious service or exercise, but considered as an opportunity for a moment of silent reflection on the anticipated activities of the day.*" J.A. 361 (emphasis added).

16. Statement by Attorney General: In June 2000, the Virginia Attorney General also underscored the need for religious neutrality. He said, "The decision whether to pray must be the decision of the student, not the decision of teachers or administrators, and not subject to government pressure." Statement of M. Earley, June 14, 2000, J.A. 362. There is no evidence that the Act is being implemented in violation of the guidance from the State Superintendent and Attorney General.

REASONS FOR DENYING THE WRIT

Summary

Petitioners say no secular purpose can be found here because none was found in *Wallace*. But *Wallace* did not hold – nor even hint – that minute of silence statutes are *per se* unconstitutional. Indeed, this Court expressly *rejected* that notion. The decision in *Wallace* was fact-specific. It was driven by Alabama's concession – indeed, its boast – that the "sole purpose" of its law was "to encourage a religious activity." *Id.* at 41, 57. The facts here are different. The result must likewise be different.

Petitioners say that, having struck the Alabama law, this Court will create a "constitutional anomaly" if it lets the Virginia law stand. Pet. 18. Such rhetoric is based on the erroneous assumption that the Alabama and Virginia statutes are identical. They are not. They have different texts, different legislative histories and different records of implementation. In short, they have different purposes, and that difference compels different results.

Finally, petitioners say that more guidance is needed on how to assess legislative purpose. They make such a

claim because, under the guidance given in *Wallace*, they clearly lose. Their effort to redefine the first prong of the *Lemon* test goes beyond their question presented, lacks support in this Court's jurisprudence, and, in any event, cannot overcome the strong evidence of secular purposes presented by the Commonwealth.

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH *WALLACE v. JAFFREE*.

> ***"The factual record of the case before us stands in stark contrast to the one presented to the Supreme Court in Wallace."***
>
> Fourth Cir. Op., Pet. 23a.

The petition does not seek to resolve a conflict among the circuits, nor does it otherwise offer this Court an opportunity to address important but unresolved questions of federal law. As shown by its single question presented, the petition is based solely on the theory that the decision by the court of appeals conflicts with *Wallace*. Petitioners are mistaken. Application of *Wallace* principles to the distinct facts of this case supports – indeed, compels – the decision reached below.

1. *Wallace*: A Challenge to *Everson*.

The history of *Wallace* is important, and it bears repeating. In *Wallace*, Alabama used a minute of silence statute as a test case for challenging *Everson v. Board of Educ.*, 330 U.S. 1 (1947), which held that the Establishment Clause applies to the States. Leading up to *Wallace*, Alabama passed three laws: (1) a 1978 statute (§ 16-1-20) requiring a minute of silence "for meditation" in public elementary schools; (2) a 1981 statute (§ 16-1-20.1) authorizing a minute of silence "for meditation or voluntary prayer" in all public schools; and (3) a 1982 statute (§ 16-1-20.2) authorizing public school teachers to lead students in prayer, including a prayer written by the Alabama legislature. *Wallace*, 472 U.S. at 40. All three statutes

were challenged in the same lawsuit. At the preliminary injunction stage, the district court found the first statute to be unobjectionable, but enjoined the other two because the sole purpose of each was "to encourage a religious activity." *Jaffree v. James*, 544 F. Supp. 727, 732 (S.D. Ala. 1982); *see also Wallace*, 472 U.S. at 41.

After trial on the merits, the district court did not change its interpretation of legislative purpose, but took it upon itself to overturn *Everson*, as Alabama had sought. Remarkably, the district court declared that "the United States Supreme Court has erred" and that "the establishment clause . . . does not prohibit the state from establishing a religion. . . . " *Jaffree v. Bd. of Sch. Comm'rs of Mobile County*, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983); *see also Wallace*, 472 U.S. at 41.

Obviously, such a result could not stand. On appeal, the Eleventh Circuit reaffirmed that States are subject to the Establishment Clause and ruled that the two statutes originally enjoined by the district court – the 1981 minute of silence statute and the 1982 teacher prayer statute – violated that constitutional provision.[10] *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983). The Eleventh Circuit's decision striking down the teacher prayer was affirmed summarily. *Wallace v. Jaffree*, 466 U.S. 924 (1984).

Granting *certiorari* on the 1981 minute of silence law, this Court predictably reiterated that the Establishment Clause applies to the States, and that lower courts must adhere to Supreme Court precedent. *Wallace*, 472 U.S. at 41-55. Reaffirming the *Lemon* test, the Court again made it plain that a statute with a *dual* legislative purpose – part secular and part religious – would *pass* the first prong, but that "a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion." *Wallace*, 472

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[10] The challenge to the original, 1978 minute of silence statute was abandoned. *See Wallace*, 472 U.S. at 40. Thus, unlike the results petitioners seek here, Alabama still had a minute of silence statute even after the decision in *Wallace*.

U.S. at 56 (emphasis added, citations omitted). With this standard in hand, the Court turned to the Alabama statute and struck it down on the grounds that "the enactment of [the 1981 law] was not motivated by *any* clearly secular purpose – indeed, the statute had *no* secular purpose." *Id.* at 56 (emphasis added). In reaching this result, the Court relied upon facts having no counterpart here:

a. In Alabama, "[t]he sponsor . . . inserted into the legislative record – apparently without dissent – a statement indicating that the legislation was an 'effort to return voluntary prayer' to the public schools." *Id.* at 56-57. When asked at trial whether he had any other purpose for the legislation, he proclaimed, "No, I did not have no other purpose in mind." *Id.* at 57. In stark contrast, the chief sponsor of the Virginia law made it clear to his colleagues that "the purpose of the Bill . . . is *not* a religious crusade. It's *not* to try and re-inject prayer into the public school system." Fourth Cir. Op., Pet. 7a (emphasis added.)[11]

b. As part of its anti-*Everson* strategy, Alabama relied at trial on the sponsor's bold assertion of a religious purpose, and "did not present evidence of *any* secular purpose." 472 U.S. at 57 (emphasis added). Indeed, Governor Fob James went so far as to tell the district court that it had "no jurisdiction because prayer flows from the Almighty." *Jaffree*, 544 F. Supp. at 729. Virginia has shown no contempt for the Establishment

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[11] Petitioners try to denigrate the significance of the sponsor's pre-enactment floor speech. In doing so, they misread Justice O'Connor's statement in *Wallace* that "little, if any weight [should be given] to *this* sort of evidence." Pet. 18, *quoting Wallace*, 472 U.S. at 77 (O'Connor, J., concurring) (emphasis added). Petitioners fail to notice that the word "this" refers to "testimony elicited from [the sponsor] during a [post-enactment] preliminary injunction hearing." *Id.* It does not refer to statements made by the chief sponsor during the legislative process to influence the votes of others.

Clause, and has defended the Act with strong evidence of its secular purposes. *See supra* at 3-11.

c. Between the trial and argument before this Court, a change in Alabama governors brought a change in litigation strategy. Unlike his predecessor, Governor George Wallace argued that the reference to "prayer" in the 1981 law was "a permissible accommodation of religion." 472 U.S. at 56-57, n.45. Such a belated discovery of a secular purpose was too contrived to be credible. While the new rationale was rejected, this Court did not say that such accommodation was invalid *per se*. *Id.*

In Virginia, the accommodation rationale is nothing new; it has been part of the statutory text since the original law was enacted in 1976. And, unlike Alabama, Virginia has shown that "constitutional rights regarding religious liberty are often misunderstood" and that our state has experienced "many instances" of "discrimination against religious expression in the public schools." Dist. Ct. Op., Pet. 64a. Moreover, Virginia seeks to accommodate not just prayer, but also non-religious forms of preparing oneself for the day ahead; and, unlike Alabama, it has only one statute by which to do so.[12]

d. When Alabama passed its 1981 minute of silence statute, its 1978 law was still on the books. The earlier law "already protected" what the Court said was "every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday." 472 U.S. at 59. Under these facts, the Court emphasized that

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[12] Petitioners complain that a minute of silence does not accommodate those prayer styles that cannot be performed while seated and silent and making no distracting display. Pet. 9, n.2. The same is true of *all* minute of silence laws, yet *Wallace* does not say that such laws are invalid *per se*. Moreover, none of petitioners has testified that his or her religion *precludes* silent, seated, non-distracting prayer.

Alabama did not identify any secular purpose not fully served by the earlier law. *Id.*[13]

By contrast, Virginia has only one minute of silence statute, and there were obvious secular purposes for changing that statute in 2000. Under the local option provision of the original statute, many local divisions were not affording their students a minute of silence. For these students, the "right to engage in voluntary prayer during an appropriate moment of silence" was not being protected. They were likewise being denied the other, pedagogical benefits of a minute of silence. The 2000 amendment solved these problems.

e. Alabama's implementation of its "minute of silence" was accompanied by numerous instances of teachers leading students in vocal prayer. *See Wallace*, 472 U.S. at 44, 45. No similar facts are present here. Instead, Virginia's administrators have a record of making sure that the minute of silence is not conducted as a government prayer exercise. *See supra* at 4, 5, 10 and 11.

In sum, the *Wallace* Court was faced with a trial record in which Alabama insisted (1) that the Establishment Clause does not apply to the States, and (2) that the 1981 law had *only* a religious purpose. Understandably, this Court felt it had no choice but to strike down the statute. By contrast, Virginia does not seek to flout the Establishment Clause, and there is compelling evidence that its law does have secular purposes. *See supra* at 3-11. In fact, its purposes are wholly secular. The unusual circumstances that compelled the result in *Wallace* have no counterpart here. "Indeed, the Supreme Court went

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[13] It was in this specific context that the Court found Alabama's "addition" of the word "prayer" to be motivated by a religious purpose. Contrary to petitioners' assertion, the Court never said that mere "inclusion" of the word is problematic. Pet. 7. On the contrary, a majority of the *Wallace* Court made it plain that there is no *per se* rule against the word "prayer" in a minute of silence statute, and that such statutes should pass muster so long as they have a secular purpose. *See infra* at 21-22.

out of its way to distinguish that case from the one now before us." Fourth Cir. Op., Pet. 24a.

2. This Case Is Too Fact-Specific to Merit Certiorari.

By framing their single "question presented" in terms that rely exclusively on *Wallace*, petitioners have defined their case so narrowly as to make it an inappropriate vehicle for further development of this Court's jurisprudence. This is so for at least two reasons:

a. As petitioners acknowledge, "the statute in *Wallace* was invalidated . . . *solely* because of its impermissible purpose." Pet. 13 (emphasis added). In other words, the Court based its decision entirely on the first prong of the *Lemon* test, which requires a secular legislative purpose.[14] The other two prongs were not addressed in *Wallace*, and thus are not at issue here.

b. The meaning of the first prong is likewise not an issue here. *Wallace* was emphatic that statutes with *dual* legislative purposes – part secular and part religious – would *pass* the first prong.[15] 472 U.S. at 56. By permitting dual motives, *Wallace* echoed *Lynch v. Donnelly*, 465 U.S.

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[14] The three prongs of the *Lemon* test are:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.

Lemon v. Kurtzman, 403 U.S. at 612, 613 (1971) (quotation marks and citations omitted). Petitioners' earlier claims under the second and third prongs are implicitly abandoned.

[15] While the Commonwealth does not wish to lose sight of the applicable standard, it nevertheless must emphasize that the purposes of the Act are *wholly* secular. Thus, the standard described in *Wallace* allows far more latitude than the Commonwealth needs in order to prevail. This also makes the case inappropriate for certiorari.

668 (1984), which said: "The Court has invalidated legislation . . . on the ground that a secular purpose was lacking, but *only* when it has concluded there was *no question* that the statute or activity was motivated *wholly* by religious considerations." *Id.* at 680 (emphasis added). "Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." *Id.* at 681, n.6.[16] The Fourth Circuit expressly relied on *Wallace* and *Lynch* for its understanding of the first prong. Fourth Cir. Op., Pet. 14a-15a.

Petitioners' arguments about dual motives have been a moving target. Despite *Wallace* and *Lynch*, they told the district court that "the legislative purpose must be *wholly secular* in order for the statute to pass the first prong" of *Lemon*. *See* Dist. Ct. Op., Pet. 63a (emphasis added). In the court of appeals, petitioners retreated from this extreme position. They failed to articulate any alternative standard, but refused to accept the standard found in *Wallace* and *Lynch*. Now, by framing their single "question presented" in terms that rely solely on *Wallace*, petitioners are bound by *Wallace's* favorable treatment of dual motives. They cannot properly use this case as a vehicle for challenging that standard. Rule 14.1(a) ("Only questions set out in the petition, or fairly included therein, will be considered by the Court.")

In order to show that the decision below conflicts with *Wallace*, they must show that the Virginia law – like the Alabama law – has *no* secular purpose. It is doubtful whether such a highly fact-specific inquiry would be worthy of certiorari in *any* case. Given the record of *this* case, the task is wholly futile.

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[16] Some laws or practices having dual purposes may also have impermissible *effects* so as to violate the second prong, but they do not run afoul of the first.

3. The Virginia Law Has Secular Purposes.

The Commonwealth has already reviewed the rich array of facts that establish the secular purposes of the Act. *See supra* at 3-11. The court of appeals did so as well. *See* Fourth Cir. Op., Pet. 5a-10a, 14a-17a, 20a-24a. Here the Commonwealth will address those five points emphasized by petitioners in their effort to distract attention from those secular purposes.

a. Petitioners incorrectly assert the text of the statute fails to articulate any secular motive. Pet. 9. They fail to refute the two secular motives found in the text by the court of appeals: (1) permitting *nonreligious* meditation, and (2) *accommodating* religion. "Even though religion is thus the object of one of the statute's purposes, the accommodation of religion is itself a secular purpose in that it fosters the liberties secured by the Constitution." Fourth Cir. Op., Pet. 16a.

Petitioners contend that the right of students to pray silently in the schools "required no accommodation because it was never restricted." Pet. 8. This assertion does not square with the record, which shows a tendency toward discrimination against religious expression in the public schools. *See supra* at 5-7. Many of our nation's laws are intended to implement constitutional guarantees. *See, e.g., Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226, 239 (1990) (upholding Equal Access Act, despite pre-existing First Amendment guarantees, and noting that Congress "perceived widespread discrimination against religious speech in the public schools.") Besides, discrimination is not the only concern. The beginning of the school day is an especially important time for those who wish to engage in mental or spiritual preparation before launching into their studies. It is hard for students to focus their thoughts if they are subjected to distractions by fellow students or the morning announcements. The Act helps students avoid these problems. In any event, this Court has already spoken favorably about statutes that "merely protect[ ] every student's

right to engage in voluntary prayer during an appropriate moment of silence during the schoolday." *Wallace*, 472 U.S. at 59. Thus, *Wallace* supports the Commonwealth, not petitioners.

Petitioners also fault the Act because its text does not mention other secular purposes on which the Commonwealth relies. Pet. 9, n.3. But there is no rule requiring all purposes of a law to be placed in the text in order to be counted. On the contrary, *Edwards* requires a court to cast a wider net by also looking at legislative history and administrative interpretation. 482 U.S. at 594. In *Wallace*, this Court looked beyond the four corners of the Alabama statute in order to find its purposes, and petitioners repeatedly ask the Court to do the same here. They apparently want a *double standard* that will allow courts to look beyond the text for *religious* motives, but not for *secular* ones. Such a skewed approach is unwarranted.

b. Petitioners say the Act must have a religious motive because the same session of the General Assembly adopted a resolution, HJR 71, favoring a constitutional amendment to allow voluntary school prayer, and thus reverse *Engel v. Vitale*, 370 U.S. 421 (1962). Pet. 9. Yet, they fail to explain how support for a constitutional amendment – a perfectly legitimate exercise – can be equated with unlawfully flouting this Court's jurisprudence. Moreover, there is nothing to connect the Act with HJR 71 other than coincidence of timing: both the resolution and the amendment were passed the same year. The memorandum explaining the Act to local school divisions makes no mention of HJR 71, nor has Virginia otherwise undertaken any campaign to link the two measures. Finally, if there were a correlation of *motives* between the two measures, one would expect to find a correlation of *votes*. Petitioners fail to show any such correlation. Instead, the record shows that the Senate amended the Act by a vote of 28 to 11, while it approved HJR 71 by a vote of 39 to 0. J.A. 441-42. In other words, regardless of how they voted on amending the Act, *every* Senator present voted for HJR 71. There is no correlation.

c. Petitioners again misstate the nature of the floor amendment rejected by the General Assembly. Pet. 10. There was never any attempt to delete just the word "prayer." *See supra* at 8. But, even if such a change had been proposed, there would have been nothing improper about rejecting it. As the chief sponsor of SB 209 explained: "The word prayer in there was put in there so prayer would not be discriminated against." Fourth Cir. Op., Pet. 8a. Moreover, the word has been in the Act since it was originally enacted in 1976, and the 2000 amendment left it untouched.[17] Deleting the word would make it appear that prayer is no longer a permitted activity. "Legislative amendments are presumed as intended to effect or change in the law. . . . We will not read into the statute language which the legislature purposefully deleted." *Shaw v. Commonwealth*, 9 Va. App. 331, 334, 387 S.E.2d 792, 794 (1990).

Petitioners' objection to the word "prayer" is also at odds with *Wallace*. Not a single Justice suggested that use of this word was sufficient to strike down the Alabama law. If it had been that simple, the Court would not have spent so much time looking beyond the text of the statute for evidence of legislative purpose. *See Wallace*, 472 U.S. at 77. Moreover, Justices Powell and O'Connor both voted to invalidate the law, but wrote separate opinions making it plain they did *not* regard the word "prayer" as fatal. Justice Powell emphasized that "Alabama's purpose was *solely* religious," but that he "would vote to uphold the Alabama statute if it *also* had a clear secular purpose." *Id.* at 65-66 (Powell, J. concurring) (emphasis added). The clear implication is that no change in the text was required, only a legitimate purpose. Justice O'Connor observed that "[a] moment of silence law that is clearly

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[17] Petitioners have not alleged that there was any improper motive in writing this language into the Act when it was originally adopted in 1976, nor does the record contain evidence of any improper motive. These omissions greatly complicate petitioners' case and, again, make it unworthy of certiorari.

drafted and implemented so as to permit *prayer*, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should *pass* this test [of constitutionality]." *Wallace*, 472 U.S. at 64 (O'Connor, J., concurring) (emphasis added). These two Justices, combined with the three dissenters who voted to uphold the Alabama statute, constituted a majority for the proposition that the word "prayer" is not fatal to a minute of silence statute. "Indeed, to require a ban on the use of religiously related terms would manifest a hostility to religion that is plainly inconsistent with the religious liberties secured by the Constitution." Fourth Cir. Op., Pet. 25a.

d. Petitioners object to the 2000 amendment because it replaces local discretion with decision-making at the state level. Pet. 11. This preference for "home rule" is not a concern of the Establishment Clause. Moreover, petitioners fail to tell the Court that the General Assembly has sweeping authority to provide direction to local school divisions, and has often exercised that authority.[18] There is nothing sinister about the exercise of that same authority here. Moreover, as the court of appeals noted,

> [there is] no material distinction between the 1976 version of [the Act], in which a political subdivision was authorized to impose a minute of silence and the current statute where the State itself imposed the minute of silence. Both are

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[18] *See, e.g.*, Va. Code § 22.1-200 (mandating teaching of specific subjects); § 22.1-201 (requiring all schools to teach various specific documents of Virginia and United States history); § 22.1-202 (mandating teaching history and principles of United States and Commonwealth flags, including pledge of allegiance and flag etiquette); § 22.1-207.1 (prescribing curriculum guidelines regarding abstinence, human sexuality and reproduction and sexually transmitted diseases); § 22.1-208.01 (requiring character education programs to foster civic virtues) and § 22.1-253.13:1 – 253.13:8 (mandating comprehensive standards of quality for local school divisions).

> mandatory minutes of silence for the students implicated, but neither is coercive in that the affected students are left to choose how they will use the minute of silence.

Fourth Cir. Op., Pet. 24a.

e. Finally, petitioners again misstate the Governor's remarks. Pet. 11-12. They quote him out of context, and fail to note that the Governor viewed the overarching purpose of the Act to be "restor[ing] calm and civility", a goal that is plainly secular. *See supra* at 10.

In sum, petitioners utterly fail to show that "the statute ha[s] *no* secular purpose." *Wallace*, 472 U.S. at 56. Thus, the decision below does not conflict with *Wallace*. There is no basis for granting certiorari.

II. THERE IS NO CONFLICT BETWEEN THE RESULTS IN ALABAMA AND VIRGINIA.

Unable to produce a conflict among the circuits, petitioners allege another sort of conflict: the Alabama law was struck down, yet the Virginia statute stands. Pet. 17-20. This is not a conflict. Petitioners are comparing apples and oranges. The differences in legislative purpose have been discussed. *See supra* at 14-17. The statutory texts are also different.[19] For example, Alabama prohibited all activities *other than* meditation and prayer. By contrast, Virginia allows *any* silent, seated activity that

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[19] The Alabama statute said:

> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for *meditation or voluntary prayer*, and during any such period *no other activities* shall be engaged in.

Wallace, 472 U.S. at 40, quoting Ala. Code § 16-1-20.1 (emphasis added).

does not distract others. Students here have much greater freedom to use the minute of silence as they choose.[20]

Unlike Alabama, Virginia expressly – and repeatedly – disclaims any intent to advance or inhibit religion. The Act says students must be subject to "the least possible pressure . . . either to engage in, or to refrain from, religious observation on school grounds." Va. Code § 22.1-203. It also says – twice – that students must "exercise . . . individual choice" in deciding how to use their minute of silence. *Id.* These disclaimers are key. "[I]f the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent." *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring in judgment). In keeping with its avowed religious intent, Alabama made no such disclaimer, and forfeited such deference.

Even if Alabama and Virginia used the same texts, it would not compel the same results. It was not the *text* of

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[20] Petitioners complain that the Act does not allow children to "opt out of the state sponsored activity." Pet. 17, n.6. Since a minute of silence is not a religious exercise, it is difficult to see on what basis a student might want to "opt-out." Even so, the statute governs what goes on inside the classroom, not what happens elsewhere in the school. Thus, contrary to petitioners' assessment, the Act does not prevent a school from excusing students from the classroom if such a request were made.

Petitioners also call Virginia's law "more onerous" than the one invalidated in *Wallace*. They note that Alabama said teachers "may" announce a minute of silence, while Virginia says they "shall" do so. Pet. 18, n.7. But the distinction between "may" and "shall" played no part in *Wallace*. 472 U.S. at 59. Indeed, the Alabama statute that survived – the original, 1978 law – used "shall". *Wallace, Id.* at 40, quoting Alabama Code § 16-1-20 (Supp. 1984) ("teacher . . . shall announce . . . a period of silence."). It is not important what *level* of government makes the decision to have a minute of silence. What is important is that Virginia provides students broad freedom to use this time as they choose.

the Alabama law that doomed it, but its legislative history and Alabama's use of the law to assault the Establishment Clause. The Virginia legislative history is markedly different, and Virginia has carefully implemented its law to comply with the Establishment Clause. *See supra* at 4, 5, 10 and 11. Thus, the difference of outcome creates no "constitutional anomaly."

Petitioners nevertheless try to shore up their "anomaly" theory with cases they say struck down minute of silence laws by "interpreting *Wallace*". Pet. 18-19. They are mistaken. The cases they cite were decided *before Wallace* and/or are otherwise distinguishable.

a. Petitioners cite *Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169 (S.D. W. Va. 1985), striking down West Virginia's constitutional requirement for a minute of silence. The district court in *Walter* lies within the Fourth Circuit. Thus, to the extent it may conflict with the decision below, *Walter* is no longer good law. Moreover, *Walter* was decided in March of 1985; *Wallace* was not decided until three months later. Thus, *Walter* did not "interpret" *Wallace*.

b. In a similar mistake about dates, petitioners cite *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982), *vacated and appeal dismissed*, 718 F.2d 1098 (6th Cir. 1983), where the district court struck down Tennessee's "Silent Prayer Act." While the case was on appeal, the law was repealed and replaced by a new "Silent Minute Act." Thus, the district court's decision was vacated as moot. 718 F.2d at 1098. All of this happened years before the decision in *Wallace*.

c. Petitioners also cite *May v. Cooperman*, 780 F.2d 240 (3rd Cir. 1985), *appeal dismissed sub. nom., Karcher v. May*, 484 U.S. 72 (1987), a case easily distinguishable on the facts. Deciding the case before *Wallace*, the district court struck down New Jersey's statute. Deciding the appeal a few months after *Wallace*, a divided panel of the Third Circuit felt bound by the district court's finding that the law lacked pedagogical value, and struck it down

under the secular purpose prong.[21] Such a result cannot be reached here. Petitioners have never alleged a lack of pedagogical value. In fact, they have *acknowledged* it. *See supra* at 4. Moreover, Virginia has affirmatively demonstrated pedagogical value by unrebutted expert testimony and the experience of localities that implemented a minute of silence before the 2000 amendment. *See supra* at 4, 5. Instead of helping petitioners, *May* illustrates how the presence or absence of a secular purpose depends on the particular facts of a case. The Fourth Circuit did a good job of reviewing the facts here. There is no need for this Court to repeat the task.

More pertinent than *May* are the two circuit courts that relied on principles from *Wallace* to uphold minutes of silence: *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998), and *Bown v. Gwinett Co. Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997). In trying to discount these cases, petitioners misstate them.

In *Chaudhuri*, the Sixth Circuit decided two issues: (1) In a split decision, the panel ruled that vocal prayer at a state university function does not violate the Establishment Clause. (2) In a unanimous decision, the panel also ruled that a moment of silence at the university is constitutional under *Wallace*. Petitioners argue that the Sixth Circuit upheld the moment of silence because of the distinction between adults and children. Pet. 19. They misread the case. The court discussed the adult-child distinction in connection with vocal prayer, not the minute of silence. *See* 130 F.3d at 238-39. Moreover, the adult-child distinction was discussed in connection with the *effects* of vocal prayer. Effects are addressed under the

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[21] The dissent in *May* persuasively notes that the relevant inquiry is not whether a court believes a minute of silence actually serves a particular purpose, but whether "the statute seems so patently ineffective or irrelevant with respect to the alleged secular purpose that it is unreasonable to believe that the legislature enacted the statute to serve that purpose." *May*, 780 F.2d at 265 (Becker, J., dissenting).

second prong of *Lemon*, which is not at issue here. *See supra* at 17. Petitioners' readiness to gloss over these facts again shows why certiorari is inappropriate.

In *Bown*, the Eleventh Circuit decided that Georgia's minute of silence statute is constitutional. Petitioners contend that Georgia "removed references to prayer" contained in a previous version of the challenged statute. Pet. 19-20. But, that is not exactly so. As amended, the statute expressly permitted "student initiated voluntary school prayers". 112 F.3d at 1466, *quoting* Ga. Code Ann. § 20-2-1050(c). While another reference to "prayer" was removed, the case did not turn on that fact. Indeed, the Eleventh Circuit relegated the change to a footnote. 112 F.3d at 1470, n.3. What is most significant about *Bown* is that the court-approved guidelines for implementing the Georgia law are the model for the implementation guidelines used in Virginia. *Compare Bown*, 112 F.3d at 1468, *with* Fourth Circuit Op., Pet. 9a. Those guidelines underscore the secular purposes of the Act.

In sum, conflicts among the circuits often furnish cases worthy of certiorari, but there is no such conflict here. Petitioners' failed attempt to manufacture some other conflict – based on different laws with different purposes – highlights the weakness of their petition. Certiorari should be denied.

III. CERTIORARI IS NOT NEEDED TO RESOLVE QUESTIONS ABOUT DISCERNING LEGISLATIVE INTENT.

In their third argument, petitioners step outside of their "question presented" and ask this Court to adopt a new standard for dual purpose statutes, a standard at odds with the one followed in *Wallace*. The evidence shows that the Commonwealth's purposes were *exclusively* secular; however, the Court need not reach that conclusion in order to see that certiorari is inappropriate.

Petitioners apparently advocate some sort of balancing test, weighing the amount of religious motivation

against the amount of secular motivation to see if the secular motives are more than "incidental." Pet. 23. Such an approach to *Lemon's* secular purpose prong is contrary to the approach followed in *Wallace*, where the Court struck down the Alabama statute because it had *"no* secular purpose." 472 U.S. at 56 (emphasis added). There is no reason to revisit this standard. But even if the Court wished to reconsider its treatment of dual motives, there are at least three reasons why this case would be a poor vehicle for doing so.

a. In their "question presented," petitioners ask for *Wallace* principles to be applied, not modified. When an issue is not included in the question presented, it is disqualified from consideration. Rule 14.1(a).

b. Petitioners cite several cases they believe suggest a less rigorous approach to dual purpose statutes than the one used in *Wallace* and *Lynch*. But, in each of those cases, the challenged practice involved *inherently religious content*. *See, e.g., Santa Fe Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (vocal prayers over loud speakers); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (teaching creationism); *Stone v. Graham*, 449 U.S. 39 (1980) (posting Ten Commandments in classroom); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (daily Bible reading in classroom). The distinction between these religious content cases and a minute of silence is fundamental:

> A state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading . . . [because] a moment of silence is *not inherently religious*. . . . [Thus] a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading.

Wallace, 472 U.S. at 72 (O'Connor, J., concurring in judgment) (emphasis added).[22] Thus, if the Court wished to consider a different approach to dual motives in cases involving inherently religious content, a minute of silence case would not be a useful occasion for doing so.

c. Even if petitioners' new approach were applied here, it would not alter the outcome. The evidence of secular purposes is too compelling. In an effort to minimize that evidence, petitioners claim the Fourth Circuit "improperly emphasized" the "absence of official statements" showing a religious purpose. Pet. 23. But, their argument is belied by the broad array of evidence addressed by the Fourth Circuit's opinion. *See* Fourth Cir. Op., Pet. 5a-10a, 14a-17a, 20a-24a. Moreover, the facts that petitioners say are over-emphasized are key points in distinguishing this case from *Wallace*. Since petitioners argue that *Wallace* governs, they should not complain when the court points out why it does not.

Finally, this Court has already provided ample guidance on how to assess legislative purpose. Much of that

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[22] Petitioners' search for the seeds of a new standard is further frustrated by this Court's treatment of cases on which they rely. For example, both *Stone* and *Schempp* were decided before the 1984 decision in *Lynch*. Both are cited by *Lynch* as examples of governmental action that was invalidated "only" because "there was no question that the statute or activity was motivated *wholly* by religious considerations." 465 U.S. at 680 (emphasis added).

Judge O'Connor's concurring opinion in *Lynch* takes a somewhat different tack in its treatment of *Stone* and *Schempp*, and in its warning against reliance on secular purposes that are *de minimus*. 465 U.S. at 690-91 (O'Connor, J., concurring) (first prong is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes."). Yet, this cautionary note would not help petitioners here, where the secular purposes are obviously substantial and where, unlike *Stone* and *Schempp*, the challenged activity is devoid of inherently religious content.

guidance is collected in Justice O'Connor's opinion in *Wallace*, where she said "the inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited." *Wallace*, 472 U.S. 74, *citing Everson v. Board of Education*, 330 U.S. 1, 6 (1947). She also noted that "[a] court has no license to psychoanalyze the legislators." *Id.*, *citing McGowan v. Maryland*, 366 U.S. 420, 466 (1961) (opinion of Frankfurter, J.). Moreover, "[i]f a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent." *Id.* at 74-75, *citing Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971).

The court of appeals followed this guidance when it held that the Act is constitutional and that "*Wallace* is clearly distinguishable." Pet. 24a. By disregarding existing guidance – and seeking new standards instead – petitioners reveal the great distance they must go in order to prevail. Their case does not merit certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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